FOR ARGUMENT

Supreme Court, U. S.
FILED
DEC 15 1978
MICHAEL RODAK, JR., CLERK

NOS. 77-1583 and 77-1578

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

* * *

AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS, ET AL.,
V.
COLUMBIA BROADCASTING SYSTEM, INC.
AND
BROADCAST MUSIC, INC., ET AL
V.
COLUMBIA BROADCASTING SYSTEM, INC.

* * *

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

* * *

# BRIEF FOR THE UNIVERSITIES OF THE STATE OF TEXAS AND THE STATE OF TEXAS AS AMICUS CURIAE

* * *

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V.

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BRIEF FOR THE UNIVERSITIES OF THE STATE OF TEXAS AND THE STATE OF TEXAS AS AMICUS CURIAE

* * *

## QUESTION PRESENTED

Amicus will discuss the question of whether a per use system of licensing is a feasible and reasonable mechanism to avoid the anti-competitive effect of the blanket license.

## INTEREST OF AMICUS

This case presents the question of whether the blanket

licensing scheme engaged in by the American Society of Composers, Authors and Publishers (ASCAP) and Broadcast Music, Inc. (BMI) for its non-dramatic performing rights is a violation of Section 1 of the Sherman Antitrust Act.[1] The decision of the Court of Appeals for the Second Circuit, finding such a Section 1 violation, would enable a television network to obtain a per use license[2] from ASCAP or BMI for the first time.

Under the new federal copyright act, effective January 1, 1978, schools, colleges and universities must pay royalties for any non-dramatic performance of a musical work unless: the use is not for profit, no one connected with the performance is paid, there is no direct or indirect admission charge, or if there is an admission charge, the net proceeds must be "used exclusively for educational, religious or charitable purposes and not for private financial gain."[3] As a result ASCAP and BMI offered schools and universities blanket licenses. The cost of the licenses was in no way keyed to the use of music. Rather, the blanket licenses charged six cents per student (ASCAP) and five and one half cents per student (BMI). *See* Appendices A and B, contracts set forth. Under the blanket licensing scheme state colleges and universities will pay for music not

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[1]Section 1 of the Sherman Antitrust Act provides in pertinent part: "Every contract, combination in the form of trust or otherwise, or conspiracy, is restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. . . ." 15 U.S.C. §1 (1970)

[2]Under the terms of a per use license, an ASCAP or BMI licensee would pay according to its actual use of music. *See CBS, Inc. v. ASCAP*, 562 F.2d 130, 134 n. 9, (2nd Cir. 1977)

[3]17 U.S.C.A. §110(4)(A) and (B) (West Cum. Supp. 1977)



used and some will pay more than others for the same usage.

The expenditure of state funds is involved in cost of these blanket licenses and the Attorney General of Texas is charged with the representation of state educational institutions.[4] The universities and the State of Texas, therefore, have a substantial interest in this case.

## STATEMENT

### A. THE APPLICATION OF THE 1976 COPYRIGHT ACT TO COLLEGES AND UNIVERSITIES

Under the new copyright act, the word "publicly" has been defined in a manner that alters previous judicial definitions.[5] A performance is public if it takes place at a place open to the public and at any place where a substantial number of persons is gathered. Thus, performances in schools and universities are public performances subject to copyright control.

There are seven exemptions in Section 110 of the 1976 Act that pertain to these public performances of music:

1. Face to face teaching activities
2. Instructional broadcasting
3. Religious services
4. Certain other non-profit performances
5. Mere reception in public
6. Agricultural fairs
7. Retail sale of records and tapes

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[4]Art. 4399, Vernon's Revised Texas Civil Statutes.

[5]17 U.S.C.A. §101 (West Cum. Sup. 1977).

Section 110(1) requires that for exemption under the face to face teaching provision there be instructors or pupils, face to face teaching activities, a non-profit educational institution and a classroom or similar place devoted to instruction. The House Report covering this Section[6] indicates that the exemption does not cover musicians brought into the classroom from outside, nor is the word instructor broad enough to cover such musician.[7]

Section 110(2) requires a transmission of a non-dramatic musical work, that the performance be in the regular course of systematic instruction at a non-profit educational institution, that the performance be directly related to teaching content and that the transmission be made for specified purposes. Systematic instruction means teaching of materials which are integrally related to the curriculum; it does not include performances, regardless of cultural or intellectual worth, which only entertain.[8]

The exemption pursuant to Section 110(3) requires performance of non-dramatic musical work in the course of services and at a place of worship or religious assembly.

Section 110(4) is a catch-all. This provision exempts direct performances before an audience, live or by record, if there is no direct or indirect commercial advantage and if done without the payment of any fee or other compensation to any of the performers, promoters or organizers. If all of these criteria are met there still cannot be an exemption unless any admission charged is used exclusively for educational, religious or charitable purposes.

---

[6]H. Rep. No. 94-1476, 94th Cong. 2nd Sess. (1976), p. 82.

[7]*Id.* at p. 81.

[8]*Id.*



The fifth, sixth and seventh exemption have no particular unique application to colleges or universities.

## B. THE OPERATION OF THE ASCAP AND BMI LICENSES IN THE UNIVERSITIES

The contracts offered by ASCAP and BMI (Appendices A and B) are two part; containing an annual "blanket" fee based on full-time enrollment and an additional fee schedule for performances where the "entertainment costs" are one thousand dollars or more. Under this tiered structure, the "blanket" or "head tax" fee is designed to cover the day to day musical uses of colleges and universities. Primary among these are the campus dances, coffee houses, sporting events where a fee is paid to the musical performers. It is unclear whether half-time shows at football games are exempt performance or not since there is a fee paid to see the football game.

The volume of music on any given university or college campus varies from campus to campus and from year to year. Under the contracts offered, some schools pay more for the right to perform music than others. Both ASCAP and BMI require that fees for major attractions be paid whether or not any of either of BMI's or ASCAP's repertory of music is performed. In addition, a concert of music licensed only to BMI would create a liability to ASCAP despite the fact that no ASCAP music was used.

Beyond these anomolies, the blanket licensing agreement being offered to colleges and universities requires the schools to take on the administrative burden of reporting monthly to ASCAP and BMI.

These reports include:

"total student enrollment for the 1977-1978

school year, by September 1, 1978; for the 1979 school year by December 31, 1978; and for the 1979-1980 school year by December 31, 1979; and for each concert, recital, similar or other event at which music is performed, for which admission is charged and for which the performer or performers are paid a total of $1000 or more, the date, name of attraction(s) appearing, name, address and seating capacity of the location, and highest price of admissions (exclusive of tax), of each such presentation, by the tenth day of each month for all concerts, recitals, similar or other event at which music is performed presented during the previous month."

Appendix A

The reporting duty further includes the furnishing, on a monthly basis, of

> "copies of all programs of musical works performed by licensee in each of its concerts, recitals and similar events presented during the previous month, which are prepared for distribution to the audience or for the use or information of Licensee or any department thereof. Such copies of programs shall include all encores to the extent possible."

Appendix A

## SUMMARY OF ARGUMENT

The formula used by the performing rights societies is not based on the use of music by the respective colleges and universities. The expanded coverage of the 1976 Copyright Act opened a whole new area for ASCAP and BMI to issue their blanket licenses. Universities and colleges are not financially nor administratively



equipped to solicit direct licensing, nor are they in a position to go to court to negotiate a "reasonable fee", which is the alternative ASCAP offers if a school rejects the form license. The blanket license offered to the nation's colleges and universities provides a windfall to the performing rights societies given the negligible bargaining power of the schools and, in addition, these licenses in their present form shift virtually all of the administrative burden to the licensee schools.

To complicate matters further the Texas Constitution, Article III, Section 51 prohibits the gift of public funds to private persons. In other words, colleges and universities must receive adequate consideration for the payment of license fees. *See, Dodson v. Marshall*, 118 S.W.2d 621 (Tex.Civ.App.--Waco 1938, writ dismd.); Attorney General Opinions H-520 (1974); H-403 (1974). Certainly a per use system of licensing would more effectively assure that colleges and universities received adequate consideration for the payment of license fees.

The per use remedy suggested by the Second Circuit in *CBC, Inc. v. ASCAP*, 562 F.2d 130, 140 (2nd Cir. 1977) will equalize the administrative burden of copyright licensing and will allow for a reasoned determination about the desirability *vel non* of blanket licenses.

## ARGUMENT

WHETHER THE COURT UTILIZES THE PER SE RULE WITH A MARKET FUNCTIONING EXCEPTION OR A RULE OF REASON ANALYSIS, THE SUGGESTED REMEDY OF PER USE LICENSING IS NECESSARY TO ASSURE A COMPETITIVE PRICING STRUCTURE FOR THE USE OF MUSICAL COMPOSITIONS.

In *CBS, Inc. v. ASCAP*, 562 F.2d 130, 136 (2nd Cir. 1977) the Court labeled the blanket license a price-fixing mechanism. While a direct market, if available, provides a defense to a charge of block booking, it is not a defense to a charge of price fixing since the blanket licenses affect the copyright holder's desire to negotiate a separate contract. The availability of direct negotiations with the copyright holder deprives ASCAP of the only defense to a charge of price fixing. *CBS, Inc. supra* at 138. Once the per se rule with a market functioning exception is used, price fixing is illegal unless it is necessary for the market to function al all. *CBS, Inc., supra* at 136. In theory the market could function through an individual licensing scheme so the blanket license is per se illegal.

At the same time the CBS Court was applying the per se rule it observed:

> The extraordinary number of users spread across the land, the ease with which a performance may be broadcast, the sheer volume of copyrighted compositions, the enormous quantity of separate performances each year, the *impracticability of negotiating individual licenses* for each composition, and the ephemeral nature of each performance all combine to create unique market conditions for performance rights to recorded music.

*CBS, Inc., supra* at 137.

It was the recognition of this phenomena which caused the CBS Court to allow the retention of the blanket license. But the Court could not find a market necessity due to the availability of a direct market. Thus the impractibility of direct negotiations contrasted with the availability of the direct market left the CBS Court with the difficult task of fashioning relief which was



reasonable and still consistent with the concerns of anti-trust legislation.

The Court considered the effect of the 1950 consent decree both in pragmatic terms and as a potential defense to price fixing. In *K-91, Inc. v. Gershwin Publishing*, 372 F.2d 1, 4 (9th Cir. 1967) the Court accepted this defense. The CBS Court rejected it because CBS was not a party to the consent decree. Treating the terms of the decree, that is its requirement that dissatisfied parties turn to the Court to set a reasonable price, the CBS Court reasoned that a judicial determination of reasonable price is not as desirable as a competitive price. The economic fact is that the reasonableness of prices have no constancy and would require constant supervision and administration. Yet it is just this alternative which colleges and universities must choose if they do not believe the blanket licenses they have been offered are reasonable.

An alternative analysis and one which could be directed to achieve the same balanced relief which the CBS Court sought is the rule of reason articulated in *United States v. American Tobacco Co.*, 221 U.S. 106 (1911). *American Tobacco* defines illegal restraint of trade to include those price fixing "acts or contracts or agreements or combinations which [operate] to the prejudice of the public interest by unduly restricting competition or unduly obstructing the due course of trade." *American Tobacco, supra* at 179. In determining whether there is an illegal restraint of trade by price fixing, the public interest in the individual right to contract and in the movement of trade could be considered. The *American Tobacco* analysis allows for an inquiry into the purpose and effect of the blanket license. It allows for flexibility in treating a unique industry. The CBS Court could have found, under this approach, that the blanket license is necessary but that it dulls the incentive of the individual copyright holder

to compete. Thus, a remedy could have been fashioned to assure the availability of a competitive price and still allow maintenance of the blanket license.

In *CBS, Inc.*, the Court suggested that ASCAP be required to provide some form of per use licensing. This would allow for protection from infringement through more freedom of choice and assure competitive prices. With respect to this relief, colleges and universities would be able to reasonably assess their needs and usages, and to negotiate from a position of equality rather than from the adhesion posture they presently hold.

The per use licensing option may well be transitional relief which would ultimately lead to pure direct licensing and truly competitive pricing. But whether it is the means by which market forces break down the performing rights societies cartel or not, the equality of such a system affords licensees is desirable.

## CONCLUSION

For the reasons above argued, this Court should affirm the result and judgment of the Court of Appeals.

Respectfully submitted,

JOHN L. HILL
Attorney General of Texas

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First Assistant

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December 1978

P.O. Box 12548, Capitol Station
Austin, Texas 78711
(512) 475-3131

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1977

* * *

No. 77-1578

* * *

BROADCAST MUSIC, INC., et al,
*Petitioners,*

-against-

COLUMBIA BROADCASTING SYSTEM, INC.,
*Respondent.*

* * *

No. 77-1583

* * *

AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS, et al.,
*Petitioners,*

-against-

COLUMBIA BROADCASTING SYSTEM, INC.,
*Respondent.*

* * *

AFFIDAVIT OF SERVICE

* * *

STATE OF TEXAS )(

COUNTY OF TRAVIS )(

ROBERT S. BICKERSTAFF, being duly sworn, deposes and says that he is in the employ of the Attorney General of Texas, counsel for amicus curiae, State of



Texas and Texas Colleges and Universities, not a party to the within action, is over the age of 18 years and resides at P. O. Box 12548, Capitol Station, Austin, Texas 78711.

That on the _____ day of _____, 1978, he served the Brief of Amicus Curiae upon each of the below-listed attorneys by depositing three (3) copies of said Brief securely enclosed in properly addressed postpaid wrappers, directed to said attorneys, in an official depository maintained and exclusively controlled by the United States Postal Service at P. O. Box 12548, Capitol Station, Austin, Texas 78711.

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_____
ROBERT S. BICKERSTAFF

Subscribed and sworn to before me this _____ day of _____, 1978.

_____
NOTARY PUBLIC

## APPENDIX A

**ASCAP**

**College and University License Agreement**

AGREEMENT between AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS ("Society"), located at One Lincoln Plaza, New York, New York 10023 and

located at ("Licensee", as follows:

1. **Grant and Term of License**

(a) SOCIETY grants and LICENSEE accepts for a term commencing January 1, 1978 and ending December 31, 1979 a license to perform publicly on LICENSEE's "premises" (as hereinafter defined) and not elsewhere, non-dramatic renditions of the separate musical compositions now or hereafter during the term hereof in the repertory of SOCIETY, and of which SOCIETY shall have the right to license such performing rights. For purposes of this agreement, LICENSEE's "premises" shall include LICENSEE's campus, any establishment in the United States engaged by LICENSEE exclusively, or any organization such as a fraternity, sorority, social club or similar organization affiliated with LICENSEE which may be located off LICENSEE's campus but is run under LICENSEE's auspices exclusively for the benefit of LICENSEE's students.

(b) This agreement shall enure to the benefit of and shall be binding upon the parties hereto and their respective successors and assigns, but no assignment shall relieve the parties hereto of their respective obligations hereunder as to performances rendered, acts done and obligations incurred prior to the effective date of the assignment.

(c) SOCIETY and LICENSEE agree that this agreement is being entered into on an experimental and

nonprejudicial basis, shall apply for the term of this agreement only, and shall not be binding upon or prejudicial to any position taken by either of the parties for any period subsequent to the termination of the agreement.

2. **Limitations on License**

(a) This license is not assignable or transferable by operation of law or otherwise, except as provided in Paragraph "1(b)" hereof, and is limited to the LICENSEE and to the premises.

(b) This license does not authorize the broadcasting, telecasting or transmission by wire or otherwise, of renditions of musical compositions in SOCIETY's repertory to persons outside of the premises.

(c) This license does not authorize any performance by means of cable television, cable radio or closed circuit limited radiation carrier current radio or television station; or performance by means of a coin-operated phonorecord player (jukebox) otherwise covered by the compulsory license provisions of 17 U.S.C. §116.

(d) This license is limited to nondramatic performances, and does not authorize any dramatic performances. For purposes of this agreement, a dramatic performance shall include, but not be limited to, the following:

(i) performance of a "dramatico-musical work" (as hereinafter defined) in its entirety;

(ii) performance of one or more musical compositions from a "dramatico-musical work" (as hereinafter defined) accompanied by dialogue, pantomime, dance, stage action, or visual representation of the work from which the music is taken:



(iii) performance of one or more musical compositions as part of a story or plot, whether accompanied or unaccompanied by dialogue, pantomime, dance, stage action, or visual representation;

(iv) performance of a concert version of a "dramatico-musical work" (as hereinafter defined).

The term "dramatico-musical work" as used in this agreement, shall include, but not be limited to, a musical comedy, oratorio, opera, play with music, revue, or ballet.

(e) SOCIETY reserves the right at any time to restrict the first American performance of any composition in its repertory and further reserves the right at any time to withdraw from its repertory and from operation of this license, any musical work as to which any suit has been brought or threatened on a claim that such composition infringes a composition not contained in SOCIETY's repertory, or on a claim that SOCIETY does not have the right to license the performing rights in such composition.

3. **License Fee**

In consideration of the license granted herein, LICENSEE agrees to pay SOCIETY the following license fees:

(a) Six cents per "student" (as hereinafter defined) or $50.00, whichever is greater, annually. For purposes of this agreement, the term "student" shall include all undergraduate and graduate "full-time equivalent students" as such term is used in the Higher Education General Information Survey reported to the United States Department of Health, Education and Welfare. Payment of said license fees for the six-month period

January 1, 1978 through June 30, 1978 shall be made on a pro-rated basis by September 1, 1978; for the twelve-month period July 1, 1978 through June 30, 1979, by December 31, 1978; and for the six-month period July 1, 1979-December 31, 1979, on a pro-rated basis, by December 31, 1979.

(b) For each concert, recital, similar or other event at which music is performed, for which there is a direct or indirect admission charge, and for which the performer or performers are paid a total of $1,000 or more, the applicable license fee in accordance with SOCIETY's "Concert Rate Schedule," a copy of which is annexed hereto and made a part hereof, payable by the tenth day of each month for all concerts, recitals, similar or other events at which music is performed presented during the previous month.

4. **Reports of Enrollment and Concerts**

LICENSEE agrees to report to SOCIETY, on forms supplied free of charge by SOCIETY, the following:

(a) LICENSEE's total student enrollment for the 1977-1978 school year, by September 1, 1978; for the 1978-1979 school year by December 31, 1978; and for the 1979-1980 school year by December 31, 1979; and

(b) For each concert, recital, similar or other event at which music is performed, for which admission is charged and for which the performer or performers are paid a total of $1,000 or more, the date, name of attraction(s) appearing, name, address and seating capacity of the location, and highest price of admission (exclusive of tax), of each such presentation, by the tenth day of each month for all concerts, recitals, similar or other events at which music is performed presented during the previous month.

5. **Lists of Compositions**

LICENSEE agrees to furnish to SOCIETY by the



tenth day of each month during the term hereof copies of all programs of musical works performed by LICENSEE in each of its concerts, recitals and similar events presented during the previous months, which are prepared for distribution to the audience or for the use or information of LICENSEE or any department thereof. Such copies of programs shall include all encores to the extent possible.

6. **Breach or Default**

Upon any breach or default by LICENSEE of any term or condition herein contained, SOCIETY may terminate this license by giving LICENSEE thirty days notice to cure such breach or default, and in the event that such breach or default has not been cured within said thirty days, this license shall terminate on the expiration of such thirty-day period without further notice from SOCIETY. In the event of such termination, SOCIETY shall refund to LICENSEE any unearned license fees paid in advance.

7. **Interference in Society's Operations**

In the event of:

(a) any major interference with the operations of SOCIETY in the state, territory, dependency, possession or political subdivision in which LICENSEE is located, by reason of any law of such state, territory, dependency, possession or political subdivision; or

(b) any substantial increase in the cost to the SOCIETY of operating in such state, territory, dependency, possession or political subdivision, by reason of any law of such state, territory, dependency, possession or political subdivision, which is applicable to the licensing of performing rights,

SOCIETY shall have the right to terminate this agreement forthwith by written notice.

8. **Notices**

All notices required or permitted hereunder shall be given in writing by certified United States mail sent to either party at the address state above. Each party agrees to inform the other of any change of address.

IN WITNESS WHEREOF, this agreement has been duy executed by SOCIETY and LICENSEE this day of , 19 .

AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS

BY _____

_____
Licensee

BY _____

_____
Title

(seal)

(seal)

## CONCERT RATE SCHEDULE*

| Seating Capacity ** | Highest Price of Admission Exclusive of Tax | | | | |
|---|---|---|---|---|---|
| | Up to $3.00 | $3.01 to $6.00 | $6.01 to $9.00 | $9.01 to $12.00 | $12.01 and Over |
| Up to 750 | $ 15 | $ 22 | $ 31 | $ 44 | $ 57 |
| 751-1500 | 21 | 29 | 41 | 55 | 70 |
| 1501-2500 | 29 | 41 | 53 | 70 | 85 |
| 2501-4000 | 41 | 53 | 65 | 85 | 100 |
| 4001-5500 | 53 | 65 | 80 | 100 | 125 |
| 5501-7500 | 65 | 80 | 100 | 125 | 150 |
| 7501-10,000 | 80 | 100 | 125 | 150 | 180 |
| 10,001-15,000 | 100 | 125 | 150 | 180 | 210 |
| 15,001-20,000 | 125 | 150 | 180 | 210 | 240 |
| 20,001-25,000 | 150 | 180 | 210 | 240 | 270 |
| 25,001-40,000 | 180 | 210 | 240 | 270 | 300 |
| Over 40,001 | 210 | 240 | 270 | 300 | 330 |



**DISCOUNT:**

1. Twenty-Five or more Concerts: A discount of 20% may be deducted from the above fees for payment for each concert in excess of twenty-five performed by LICENSEE during a school year.

2. Advance Payment for One Hundred or more Concerts: A discount of 5% may be deducted from the above fees for payment in advance by LICENSEE to SOCIETY for one hundred or more separate concerts.

* This schedule applies to concerts, recitals, similar and other events at which music is performed, for which there is a direct or indirect admission charge, and for which the performers are paid a total of $1,000 or more.

** Where a concert occurs at a location whose total seating capacity has been altered to accommodate a particular performance, the term "seating capacity" shall mean the total number of seats made available for that particular performance.

**AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS**

**CONCERT REPORT** MONTH of _____ 19 ____

| DATE | NAME OF ATTRACTIONS APPEARING | LOCATION OF PREMISES (name, address) | SEATING CAPACITY | HIGHEST PRICE OF ADMISSION (exclusive of tax) | ASCAP LICENSE FEE |
|---|---|---|---|---|---|
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I hereby certify that the foregoing Statement is true and correct as of this _____ day of _____ 19 ____

_____ LICENSEE

By _____

TOTAL

A-8

# APPENDIX B

BMI

C/U—78

AGREEMENT made at New York, N. Y. on ..... 19..., between BROADCAST MUSIC, INC. (or BMI), a New York corporation, with its principal offices at 40 W. 57th Street, New York, N. Y. 10019, and

.....
*(Legal Name of* LICENSEE *and Name of Institution)*

(LICENSEE), with its principal business office located at ..... City of ..... State of ....., Zip No. .....

IT IS AGREED AS FOLLOWS:

1. Definitions

(a) "Term" shall mean the period commencing January 1, 1978 and ending on December 31, 1979. "First Contract Year" shall mean the period commencing January 1, 1978 and ending December 31, 1978. "Second Contract Year" shall mean the period commencing January 1, 1979 and ending December 31, 1979.

(b) "Theaters" shall include, but not be limited to, concert halls, theaters, auditoriums, amphitheaters, stadiums and similar places of performance whether enclosed or not.

(c) "Musical Attractions" shall mean concerts, stage shows, variety shows, symphonies, recitals, chamber music and other similar performances under the sponsorship, control, authority, and with direct or indirect approval of the LICENSEE, where music is performed.

(d) "Seating Capacity" shall mean the total number of seats permanently affixed in any theater where a musical attraction is performed, plus any

temporary seats added within the theater for a particular performance. Should a musical attraction be performed at a theater where the seating capacity has been altered to accommodate a particular musical attraction, or if the total number of seats made available for a particular musical attraction shall be less than that of the seating capacity of said theater, then in those instances, seating capacity shall mean the total number of seats made available for that particular performance. If a site does not have permanent seating, "seating capacity" shall be interpreted to mean the number of persons attending a particular performance.

(e) "Full-time Students" shall include all full-time students and full-time equivalents attending an institution for educational purposes and shall include, but not be limited to, graduate and undergraduate students. Part-time students shall be converted into full-time equivalents pursuant to the methods set forth in the Higher Education General Information Survey as conducted annually by the Department of Health, Education, and Welfare and shall include, but not be limited to, graduate and undergraduate students.

(f) "Entertainment Costs" shall mean the total monies expended by LICENSEE (or the persons having direct or indirect authority from LICENSEE to promote musical attractions) for a musical attraction and shall include, but not be limited to, main attractions, supporting acts, monies paid to performers, monies paid to booking agents, monies paid to agents of the performer, monies paid to supporting musicians, room, board and transportation.

(g) "Public Domain Music" shall mean any musical composition not protected by copyright.

2. In the event LICENSEE has a pecuniary interest in an establishment or property for investment purposes



which is not directly related to LICENSEE'S educational purposes at which establishment or property musical compositions are being performed publicly, it is specifically understood and agreed to by LICENSEE that this license shall not apply to such other establishment or property.

3. BMI hereby grants to LICENSEE for the term of this agreement a non-exclusive license to perform or cause the performance of musical compositions to which BMI shall have the right to grant public performance licenses for performances presented under the sponsorship, control, authority, and with the direct or indirect approval of LICENSEE. This license is not assignable and no rights other than those mentioned are included in this license. This license does not include:

(a) Dramatic rights or the right to perform dramatico-musical works in whole or in substantial part; or

(b) The right to broadcast, telecast, or otherwise transmit the licensed musical attraction except within other campus buildings owned or controlled by LICENSEE.

4. LICENSEE agrees to pay BMI a fee for each performance of a musical attraction computed on the basis of Schedule "A" included in and made a part of this contract. Payment for musical attractions shall be made to BMI by the tenth (10th) day of each calendar month of the term hereof for all performances given during the previous month. LICENSEE shall furnish BMI (on forms to be supplied by BMI), at such times as it makes payment of license fees pursuant to this paragraph with a statement signed by an officer, auditor, or authorized official of LICENSEE covering performances of musical attractions occurring during the previous month. Such statement shall include the name of each musical attraction, the dates of each musical attraction

the dates of each musical attraction and the number of performances each day, the theater at which the performance took place and the seating capacity of the theater. A statement shall be furnished to BMI by LICENSEE each month regardless of whether or not any performances occured during the previous month.

5. "Per Student Fee".

(a) Except for those uses previously excluded, LICENSEE shall also pay BMI for each contract year a "Per Student Fee" for all other uses of music, including, but not limited to, campus radio broadcasting stations where said station's gross income derived from the sale of air time is less than $10,000 annually, the sum of five and one-half (5.5) cents per full-time student; or $60.00, whichever is greater. This fee shall be based upon the number of full-time students as defined in paragraph 1(e) for the fall term of each preceding year.

(b) The "Per Student Fee" for the First Contract Year of this contract is $ based upon full-time students enrolled in the institution during the fall term of 1977. LICENSEE shall notify BMI, on a form to be supplied by BMI, no later than November 30, 1978, of the number of Full-time Students, as defined above, attending the institution during the fall term of 1978, which will establish the "Per Student Fee" for the Second Contract Year.

(c) The "Per Student Fee" for the First Contract Year (1978) shall be paid by LICENSEE to BMI in the following manner:

1. One-half of the annul "Per Student Fee" will be due and payable on or before June 10, 1978.

2. The balance of the "Per Student Fee" for the First Contract Year (1978) will be due and payable on or before October 10, 1978.



(d) The "Per Student Fee" for the Second Contract Year (1979) will be paid by LICENSEE to BMI in the following manner:

1. One-half of the annual "Per Student Fee" will be due and payable on or before January 10, 1979.

2. The balance of the "Per Student Fee" for the Second Contract Year (1979) will be due and payable on or before July 10, 1979.

(e) Where LICENSEE does not cause the performance of any music other than musical attractions no "Per Student Fee" shall be due and payable to BMI. In such instances, LICENSEE will pay BMI the fees for musical attractions pursuant to Schedule "A". However, it is agreed and understood by LICENSEE that these fees will be due BMI whether or not the costs of such a musical attraction are less that $1,000.00.

(f) Where LICENSEE, at the time of the execution of this agreement, does not cause the performance of any music other than musical attractions, and thereafter, during the term of this agreement, does cause the performance of any music other than musical attractions, LICENSEE shall notify BMI promptly in writing, and shall pay the applicable "Per Student Fee" from the commencement date of said usuage of music.

6. All campus radio broadcasting stations licensed pursuant to this agreement shall, upon written request from BMI made on not less than one (1) week's notice specifying the period to be covered by the request agree to furnish to BMI weekly lists of station's performances of all musical works, indicating the compositions performed by title and composer or by such other convenient method as may be designated by BMI but such lists need not be furnished for more than two (2)

weeks of each year of the term of this agreement.

7. BMI shall have the right by its authorized representatives, any time during customary business hours, to examine the books and records of account of LICENSEE to such extent as may be necessary to verify any and all statements rendered and accountings made hereunder.

8. In the event that BMI, at any time during the contract term, shall, for the same class and category as that of the LICENSEE issue licenses granting rights similar to those in this agreement on a more favorable basis, BMI shall, for the balance of the term, offer the LICENSEE a contract containing the same terms.

9. BMI agrees to indemnify, save harmless, and defend LICENSEE, its officers, and employees from and against any and all claims, demands or suits that may be made or brought against them or any of them with respect to the performance of any material licensed under this agreement. Such indemnity shall be limited to works which are licensed by BMI at the time of LICENSEE's performance. BMI's Clearance Department will, upon request, advise LICENSEE whether particular musical works are available for performance as part of BMI's repertory. LICENSEE agrees to give BMI immediate notice of any such claim, demand, or suit, to deliver to BMI any papers pertaining thereto, and to cooperate with BMI with respect thereto, and BMI shall have full charge of the defense of any such claim, demand, or suit.

10. All disputes of any kind, nature or description arising in connection with the terms and conditions of this agreement shall be submitted to arbitration in the City, County, and State of New York under the then prevailing rules of the American Arbitration Association by an arbitrator or arbitrators to be selected as follows: Each of the parties shall, by written notice to



the other, have the right to appoint one arbitrator, If, within ten (10) days following the giving of such notice by one party shall not, by written notice, appoint another arbitrator, the first arbitrator shall be the sole arbitrator. If two arbitrators are so appointed, they shall appoint a third arbitrator. If ten (10) days elapse after the appointment of the second arbitrator and the two arbitrators are unable to agree upon the third arbitrator then either party may, in writing, request the American Arbitration Association to appoint the third arbitrator. The award made in the arbitration shall be binding and conclusive on the parties and judgment may be, but need not be, entered in any court having jurisdiction. Such award shall include the fixing of the costs, expenses, and attorney's fees of arbitration, which shall be borne by the unsuccessful party.

11. Upon any breach or default of the terms and conditions of this agreement, BMI may, at its sole option, cancel this agreement with not less than ten (10) days notice in writing to LICENSEE. The right to cancel shall be in addition to any and all other remedies which BMI may have. No waiver by BMI of full performance of this agreement by LICENSEE in any one or more instances shall be deemed a waiver of the right to require full and complete performance of this agreement thereafter or of the right to cancel this agreement in accordance with the terms of this paragraph.

12. All notices given by BMI hereunder shall be duly and properly given if mailed to the address set forth above.

13. This agreement constitutes the entire understanding between the parties with respect to the subject matter hereof. This agreement cannot be waived or added to or modified orally and no waiver, addition or modification shall be valid unless in writing and signed

by the parties. This agreement, its validity, construction and effect, shall be governed by the laws of the State of New York.

BROADCAST MUSIC, INC. .....
LICENSEE*(Legal Name)*

By: ..... By: .....
*(Signature)*

.....
*(Print Name of Signer)*

.....
Title of Signer

## SCHEDULE A

If the entertainment costs of a musical attraction total $1,000.00 or more, except as provided for in paragraph 5(e), LICENSEE shall pay to BMI the following fee:

**Schedule of Rates**

| CATEGORY | SEATING CAPACITY | FEE PER PERFORMANCE |
|---|---|---|
| 1 | Up to 1,500 seats | $ 15.00 minimum |
| 2 | 1,501 to 2,500 seats | 25.00 |
| 3 | 2,501 to 5,000 seats | 40.00 |
| 4 | 5,001 to 7,500 seats | 55.00 |
| 5 | 7,501 to 8,500 seats | 70.00 |
| 6 | 8,501 to 10,000 seats | 85.00 |
| 7 | 10,001 to 12,500 seats | 100.00 |
| 8 | 12,501 to 15,000 seats | 140.00 |
| 9 | 15,001 to 17,500 seats | 160.00 |
| 10 | 17,501 to 20,000 seats | 180.00 |
| 11 | 20,001 to 30,000 seats | 200.00 |
| 12 | Over 30,000 seats | 300.00 maximum |



Where a musical attraction is believed to be comprised entirely of musical compositions which are in the public domain, LICENSEE may, at his option, submit a schedule of all those musical compositions performed at said musical attraction, and in those instances, after review by BMI, where all of the musical compositions performed at said musical attraction are in the public domain, no fee shall be due and payable to BMI. In the event no schedule is submitted to BMI, LICENSEE must pay the applicable fee for said musical attraction pursuant to Schedule "A".

INSTRUCTIONS: *Complete white areas on pages 1, 2, and 3.*